



**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1979

No. 79-578

**FLOWERVALE, INC., EDWINA RAGER
and EDWARD RAGER,**

Petitioners,

-against-

**INLAND CREDIT CORPORATION, PLANTATION
HOUSE & GARDEN PRODUCTS, INC., STANLEY E.
STERN, OSCAR DANE and HAROLD GREENSTEIN,**

Respondents.

PETITIONERS' REPLY BRIEF

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The Petitioners respectfully submit this Reply Brief in response to the Respondents' Brief in opposition to the Petition for a Writ of Certiorari.

The Respondents misleadingly represent to the Court that there was no written agreement signed between the parties on December 6, 1974, (Resp. Br. p. 4).

In reply, we respectfully submit that the central issue as to whether or not there was such an agreement constituted an issue of material fact which absolutely precluded the granting of summary judgment in the state court below.

That agreement was admittedly signed by the Respondents in examinations before trial given by the Respondents Dane and Greenstein (Petition p. 22). The agreement was documented on the Respondent Inland Credit Corporation's own letterhead (Petition, A25a). The agreement was signed and initialled by the Respondents simultaneously with and in consideration of the transfer of Petitioners' real property to Respondents on December 6, 1974, pursuant to the terms thereof, specifically as alleged in paragraphs 17 to 21 incl. of Petitioners' verified complaint (17a-19a).

On this indisputable documentation, the grant of summary judgment was not mere "error," as contended by Respondents (pp. 5-7), but constituted error of constitutional magnitude, in flagrant violation of the State's statutory powers and the judicial precedents thereunder, thus depriving Petitioners of substantial rights without due process of law.

The constitutional principle asserted by Petitioners at bar was clearly set forth in *Boddie v. Connecticut*, 401 US 371, 375 (1971), wherein the Court stated:

"At its core, the right to due process reflects a fundamental value in our American constitutional system * * * system * * *

Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a 'legal system,' social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society. Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the 'state of nature.' * * * .

It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle." (Emphasis supplied).

And further, at pp. 377-8:

"* * * due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that '[w]herever one is assailed in his person or his property, there he may defend,' *Windsor v. McVeigh*, 93 US 274, 277, 23 L. Ed 914, 915 (1876). See *Baldwin v. Hale*, 1 Wall 223, 17 L Ed 531 (1864); *Hovey v. Elliott*, 167 US 409, 42 L Ed 215, 17 S Ct 841 (1897). The theme that 'due process of law signifies a right to be heard in one's defence,' *Hovey v. Elliott*, supra, at 417, 42 L. Ed. at 221, has continually recurred in the years since *Baldwin*, *Windsor*, and *Hovey*. Although '[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause,' as Mr. Justice Jackson wrote for the Court in *Mullane v. Central Hanover Tr. Co.*, 339 US 306, 94 L Ed 865, 70 S Ct 652 (1950), 'there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' *Id.*, at 313, 94 L Ed at 873."

The test of due process cannot be resolved on the narrow ground, asserted by Respondents, that the Petitioners were merely "served with notice of all proceedings which took place in the foreclosure action" (Resp. Br. pp. 3-4). The crucial test is, rather, whether Petitioners had a fair opportunity to be heard in view of the indisputably documented incapacity of Edward Rager as attorney to defend the mortgage foreclosure proceeding on behalf of the Petitioners, as specifically alleged in paragraphs 21, 21a and 39 of Petitioners' two causes of action (App. 36a-37a, 42a).

That documentation is graphically shown by Respondents' own several admissions unequivocally acknowledging his mental illness and incapacity to represent the Petitioners (Pet. Br. pp. 34-35); by the personal observations of his wife, the Petitioner Edwina Rager (Pet. Br. pp. 34-35); by the court records of judicial decisions and records conclusively attesting thereto, particularly including the decision by Mr. Justice Pittoni of Suffolk County denying Edward Rager's motion to open his default to answer the mortgage foreclosure proceeding because of "*the rambling, almost incoherent, moving affidavit by the attorney for the defendant*" (Pet. Br. p. 23); by the contemporaneous decision of Mr. Justice Helman, Supreme Court, New York County, as characterizing "*incomprehensible*" Edward Rager's bizarre motion to "consolidate" the Suffolk County foreclosure proceeding with the virtually identical foreclosure proceeding pending in New York County (Pet. Br. 24); and by the interrelated decision thereto by Mr. Justice Hughes, again rejecting Petitioner's new papers submitted as the "*almost incoherent affidavit of Mr. Edward Rager, counsel for movants*" (Pet. Br. p. 25).

On the conclusively established triable facts documented herein, the denial to Petitioners of a fair opportunity to be heard is plainly abhorrent to the Due Process Clause of the Constitution, contrary to the long-settled judicial precedents laid down by this Court as well as by the state court below, and is totally alien to the rule of equal justice under law.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI
SHOULD BE GRANTED.

Respectfully submitted,

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November 9, 1979